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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 571

WERNER C. VON CLEMM, ET AL.,
Petitioners,
v.
ELIZABETH RUDEL SMITH, TREASURER OF THE UNITED STATES, ET AL.,
Respondents,
v.
INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, ET AL.,
Intervenor-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN A. WILSON,
ROBERT L. CLARE, JR.,
B. G. ANDREWS,
Counsel for Petitioner Werner C. Von Clemm.

SHEARMAN & STERLING,
20 Exchange Place,
New York, New York 10005,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioner, WERNER C. VON CLEMM, hereby respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that Court which affirmed the decision and judgment of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported. It is set forth as Appendix B to this petition.

The opinion of the District Court is reported in 255 F. Supp. 353. It is also set forth on pages A-3 through A-51 of petitioner's Appendix, printed for the use of the Court below and nine copies of which are filed in this Court with this petition under the provisions of Rule 21, paragraph 4.*

Jurisdiction

The jurisdiction of this Court is invoked under 62 Stat. 928 (28 U.S.C. §1254(1)). The judgment of the Court below was entered on June 22, 1966.

The Questions Presented

1. Whether the burden of proof imposed by the Courts below upon petitioner violates the Fifth Amendment of the United States Constitution.

2. Whether petitioner upon the facts found by the Courts below was an "enemy agent" of the German Government within the meaning of the Trading with the Enemy Act.

Constitutional and Statutory Provisions Involved

The pertinent parts of Amendment V to the United States Constitution, and Sections 9(a) and 2 of the Trading with the Enemy Act, as amended (50 U.S.C. App. §§(2) and 9(a)), are set forth in Appendix A hereof.

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* Unless otherwise indicated, references herein are to the pages of petitioner's Appendix filed in the Court below and now on file in this Court.

Summary Statement

This suit was brought under Section 9(a) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 9(a)) (the "Act"). Jurisdiction in the District Court was based upon 28 U.S.C. §1331.

Petitioner seeks recovery of stock of Pioneer Import Corporation ("Pioneer") and the proceeds, amounting to approximately $1,300,000, realized from the sale of certain diamonds, synthetic and semi-precious stones, which were vested under Section 5(b) of the Act and sold by the Alien Property Custodian in 1945 (A-3-4).

There are related administrative proceedings which are still pending before the Office of Alien Property. *Matter of 40 Consolidated Claims of Carrie M. K. Beir, et al.*, Dkt. No. 183, Office of Alien Property (1955). Chief Hearing Examiner Harry L. Jones has there held with respect to the claims of petitioner that he was not "an enemy agent" of the German Government nor "enemy tainted." His opinion was marked as Plaintiff's Exhibit B in the trial court. It is presently awaiting review by the Attorney General. *International Mortgage & Investment Corp.* v. *Von Clemm,* 301 F. 2d 857, 859 (2d Cir. 1962).

Section 2 of the Act provides, so far as pertinent here, that the word "enemy" is defined as:

> "(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

Petitioner is a naturalized United States citizen, having emigrated to this country from Germany in 1922. He has since resided and been domiciled in the United States

and he became a citizen in 1932. He married a United States citizen, has two children, both born, reared and educated in this country (A-8, 9). Since 1933 petitioner has been engaged in the importing business, and he is still in that business (A-9-21).

Petitioner's Activities Prior to December 11, 1941—U. S. Declaration of War

In 1938, petitioner formed Pioneer to import into the U. S. goods from Germany, the purchase price of which was to be paid in part with German "blocked marks" and in part with U. S. dollars. The use of blocked marks, as found by the Court of Appeals, was "purely commercial" (Appendix B. p. 3b). Moreover, none of the products involved in this proceeding were purchased with blocked marks. The goods imported consisted of toys, vacuum bottles and lily bulbs and the like. They were purchased in Germany by a German firm called "Eurohandel". Petitioner's brother, Carl, a national and resident of Germany, was then employed by that firm (A-10, 13). About October, 1939, Carl resigned from Eurohandel and organized a German firm referred to as "Imico". Thereafter, the purchases of Pioneer and its successor firms, of goods from Germany, for export to the U. S. were from Imico (A-17).

After the cessation of operations by Pioneer, in 1940, petitioner formed F. M. Alison & Company, and then in April, 1941, a partnership, Bridge Import Company ("Bridge"), to continue his business (A-18-19).

The war had begun in Europe in September, 1939, and the British had set up a blockade of Germany. The United States entered the war on December 11, 1941.

Until June 14, 1941, when the President extended the "freeze order" (Executive Order 8389, 12 U.S.C. §95a note) to Germany, goods from that country could be freely imported into this country under United States law* (Appendix B. pp. 3b-4b). Such trade with Germany had the full approval and encouragement of the U. S. authorities. On April 8, 1940, the Legal Advisor to the Secretary of State wrote petitioner that:

> "* * * You may be assured that the Department [of State] is doing all that it can to assist American importers of German goods * * *" (A-125).

Despite the fact that it was lawful to engage in such importing activities under U. S. law, the British blockade made it difficult for importers such as petitioner to do so (Appendix B, p. 4b). Resort had to be made to codes, circuitous routes and other methods to avoid the British authorities (A-16). In spite of the utilization of all of these methods, it finally became impossible to import bulky goods through the British blockade. (A-77-81). As a result, petitioner began to import diamonds and synthetic and semi-precious stones which are the subject of this action.

While the Presidential freeze order of June 14, 1941 was in effect, petitioner imported three shipments of diamonds. The first was cleared by U. S. Customs and sold by him. As a result of this sale, petitioner was convicted in 1943, in the U. S. District Court for the Southern District of New York, on the charge that he had made a false customs declaration that the diamonds were cut in Germany instead of Holland and Belgium as the Government alleged (Appendix B, p. 6b). This first shipment is

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* Executive Order 8389 did not prohibit the importation of goods as such, but provided that payment for the goods could not be made without a license from the U. S. Treasury (A-20).

not involved in this proceeding. The second and third shipments, covered by invoices dated December 4, 1940 and February 17, 1941, respectively, were detained by Customs, ultimately vested by the Alien Property Custodian and later sold (Appendix B. p. 6b). Petitioner seeks the proceeds of sale in this action.

The relationship between Imico and petitioner with respect to the semi-precious stones transactions was similar to that with respect to the diamond transactions, except that there was in addition the so-called "Jalmaç", or German Navy transaction, which occurred, however, in 1939 before the United States entered the war (Appendix B, p. 7b).

Based upon the foregoing, the Courts below found that petitioner was an agent of the German Government prior to the declaration of war on December 11, 1941 (A-38; Appendix B, p. 6b).

Petitioner's Acts After December 11, 1941

There were only three post-war incidents, that is, incidents after December 11, 1941, which will be discussed in detail hereafter. It will suffice, at this point, to say that the District Court stated that these three incidents, standing alone, would not justify a finding of enemy agency after December 11, 1941 (A-40). The Court goes on to state, however, that the three incidents may be indicative of the continuation of petitioner's pre-December 11, 1941 operations, and the Court so found (A-40-44).

The Court of Appeals affirmed on similar reasoning, and said with respect to the evidence of petitioner's activities after the war: "part * * * tends to show he ceased his importing operations, and part the opposite, although none of the evidence is conclusive." (Appendix B, p. 8b).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Court of Appeals decided an important question of Federal law as to the meaning of "enemy agent" under the Trading with the Enemy Act, which has never been settled by this Court.

The District Court held petitioner to be "an enemy agent" under the Act. Thus, the Court's holding, without more, results in a confiscation of the property of an American citizen, and a branding of that citizen as a traitor to his country. This Court has held that such "confiscation is not easily to be assumed." *Guessefeldt* v. *McGrath,* 342 U. S. 308, 319 (1952).

The meaning of the term "enemy agent", as the District Court below observed, is not defined in the Act (A-35). Moreover, the "few judicial decisions" (A-35) referred to by the District Court related to situations far different from that in the instant case.* The District Court and the Court of Appeals reached their conclusions without benefit of any precedents for guidance:

> "I am called upon to decide this question without the benefit of controlling authority either way" (A-43).

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* *Sarthou* v. *Clark,* 78 F. Supp. 139 (S.D. Cal. 1948) involved a German citizen engaged in espionage missions in France and elsewhere. *Hansen* v. *Brownell,* 234 F. 2d 60 (D.C. Cir. 1956) involved a claimant who resided in Germany from 1939 until April 1948, and had taken an active part in the furtherance of the German war effort by propaganda work. *Stadtmuller* v. *Miller,* 11 F. 2d 732 (2d Cir. 1926) concerned a German citizen who was present in Germany throughout World War 11. *Rusche* v. *Brownell,* 136 F. Supp. 835 (D.C. 1955), *aff'd* per cur. 244 F. 2d 782 (D.C. Cir. 1957) involved employment by a claimant in an executive fashion in a German corporation, which manufactured equipment for the German Army during the war, with residence in Germany at the time as a German citizen.

Petitioner's Acts Before December 11, 1941, Upon Which the Court Below Found Agency

In reaching its conclusion that petitioner was an "enemy agent", the Court below made no attempt to construe the term by reference to the statute, its legislative history or other usual tools of construction. Nor did the Court apply elementary principles of agency such as: that the agent be subject to the control of, and have power to act for and bind, his principal (Appendix B. pp. 9b-10b).

The Court below applied two criteria in finding that petitioner was an agent of the German Government before December 11, 1941. The first was that the diamond and stone transactions "were beneficial to the German Government" in providing foreign exchange (A-37). But such benefit to the German Government, resulting from commercial activities engaged in primarily to derive private profit, before the war, would not make petitioner an agent of the German Government. Chief Hearing Examiner Jones so held at p. 168 of his opinion (*supra,* p. 3). See also *Manufacturers Trust Co.* v. *Kennedy,* 291 F. 2d 460, 463, (2d Cir. 1961).

The second criterium applied by the Courts below in holding petitioner an agent of the German Government before the outbreak of war with the United States was the designation by the German Government of Imico as exclusive exporter and Imico's designation, in turn, of petitioner as "sole importer" to the United States (A38). Again Chief Examiner Jones, is to the point, at p. 168 of his opinion, when he states:

> "• • • The fact that von Clemm for Pioneer was given the exclusive franchise of importing Idar-

> Oberstein products under Germany's controlled economy does not make von Clemm an agent of the German government. * * *"

We believe that the Courts below erred in their conclusion that petitioner was a German agent prior to December 11, 1941, and this conclusion was basic to their ultimate determination of his ineligibility as an "enemy agent", to seek recovery of his property.

Petitioner's Acts After December 11, 1941—The "Three Incidents"

The "three incidents" after December 11, 1941 do not show any "continuance" of petitioner's agency, assuming such pre-war agency did exist. The District Court pointed out that these acts of petitioner were "not extensive" and then concluded (A-40):

> "If there were no other evidence in this case and if the burden of proof were upon the government, it is by no means clear that these three incidents, by themselves, would justify a finding that von Clemm acted on behalf of the German Government after December 11, 1941."

Then the District Court reasoned as follows (A-41):

> "Once we start with the premise that von Clemm's activities before December 11 made him a German agent at that time * * * then the burden is upon von Clemm to show that he discontinued those activities upon the outbreak of war."

As to the burden of proof, the District Court stated (A-39):

> "The question must be decided upon the evidence in the present case, bearing in mind that the bur-

den is on plaintiff to prove a negative, i.e., that he was not an enemy."

The District Court and the Court of Appeals then took the view that the three post-war incidents might be indicative of the continuation after the outbreak of war, of pre-war operations. That possibility it next combined with a presumption of the continuance of those pre-war operations. And this presumption, in turn, it combined with the imposition of the burden of proof upon petitioner to prove a negative and to show by affirmative acts the termination of his pre-war operations (A-41-42). The three post-war incidents were as follows:

1. *The "First Incident"*

Petitioner sent the following cable on December 18, 1941, to Lambercier, a Swiss national, who was a special partner in Bridge:

> "SEND PROOF DIAMOND ONE SAME AS OTHERS. LICENSE 213177 NO FUNDS WHILE MERCHANDISE HELD PENDING INVESTIGATION" (A-107).

This concerned the first shipment of diamonds ("Diamond One"), which were released by U. S. Customs and sold by petitioner, resulting in his conviction on the charge of having made a false declaration as to their origin.

When petitioner sent the cable he was under Grand Jury investigation as to the origin of these diamonds. The issue there was whether they were cut in Belgium, or in Holland or in Germany. In an entirely understandable attempt to clear himself, he sought proof of their German origin as represented by him to Customs. Hence, this cable. Obviously, it concerned a wholly different matter—the pending Grand Jury investigation (A-32).

2. *The "Second Incident"*

This incident also occurred after December 11, 1941. The District Court described it and never commented upon it thereafter. The District Court stated that in March, 1942, von Clemm received a letter dated January 7, 1942, from Le Coultre & Cie of Geneva. The letter stated that by order of A. Baccala of Switzerland, Le Coultre had consigned two boxes of stones to Bridge. In September, 1941, petitioner had solicited business from Baccala. But petitioner never accepted this shipment of stones (A-33-34).

For petitioner was then out of business. He had no further interest in the shipment. He merely did what any responsible businessman would do: he referred the shipment to another dealer in New York (A-34). In so doing, he received no profit or other remuneration as a result. These stones were vested by the Alien Property Custodian in 1948 (A-72-73, A-91-92).*

This incident cannot possibly be regarded as any evidence that petitioner continued the pre-December 11, 1941 transactions beyond that date. It establishes the exact opposite, namely, that petitioner was out of business and had terminated a pre-December 11, 1941 transaction.

3. *The "Third Incident"*

On April 21, 1942, petitioner applied for a license, pursuant to Executive Order No. 8389, to pay into a blocked account in a New York bank a sum which he owed to Lambercier (A-34).

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* The Court of Appeals incorrectly states that "von Clemm, on receiving the stones, turned them over to another dealer." (Appendix B, p. 9b). The District Court's finding, however, is that "von Clemm did not accept the shipment of stones from Le Coultre" (A-34).

This "third incident" established in the District Court's view that petitioner "tried to carry on as well as he could with what he had previously been doing" (A-40). The District Court erroneously took the view that petitioner was still "seeking delivery of several shipments of stones which Lambercier had sent him" (A-41).

But clearly the District Court could not have understood the purpose of Executive Order No. 8389, or what a license thereunder to pay into the blocked account of a creditor in New York accomplished.

The Executive Order empowered the Secretary of the Treasury to inaugurate a system of licenses which permitted a person in the United States who owed money to a blocked foreign national to pay the funds into a blocked bank account in New York City in the name of that blocked national. But the "banks of course, into which accounts were paid, held them as blocked funds and could make no payments without a [further U. S. Treasury] license." Reeves, *The Control of Foreign Funds by the United States Treasury,* 11 LAW AND CONTEMP. PROB. 17, 41 (1945). Petitioner's application to pay funds into a blocked New York account was denied. Therefore, he was never in a position to make—and he did not make—any application for a further license to pay Lambercier funds or Imico funds out of a blocked New York account.

Payment into the blocked account of Lambercier would not have resulted in any "trading" or "dealing" with Lambercier or indeed in any payment to him. And the Treasury Department would continue to have "full and complete control" of these funds. *Alexewicz* v. *General Aniline & Film Corporation,* 181 Misc. 181, 184-5, 43 N.Y.S. 2d 713, 718-9 (S. Ct. Broome Co. 1943).

Thus petitioner was not engaged in any wrongful conduct when he applied for a license merely to make a

payment into a blocked account in Lambercier's name in New York. Indeed, the contrary is the fact. Further, it was sometimes essential that such license application be made in order lawfully and properly to protect one's rights in connection with an existing indebtedness. *Iwazo Yamashita* v. *Clark*, 75 F. Supp. 51, 57-58 (D. Hawaii 1948).

The merchandise transactions for which petitioner sought licenses had been fully executed when petitioner's application was made. There was nothing left to be done. There was only a unilateral obligation by petitioner to pay Lambercier (A-92). That obligation under New York law was suspended by the intervention of war and not voided. Therefore, petitioner was required to pay his debt when the war was terminated. *Neumond* v. *Farmers Feed Co.*, 244 N. Y. 202, 206 (1926). It was necessary that he apply for a license to pay funds into a blocked account for Lambercier in New York in order to protect his own post-war position. See Reeves, *The Control of Foreign Funds by the United States Treasury, supra*, p. 12, at p. 41.

In any event, an application for a license, which merely constitutes the seeking of permission of the Treasury Department to do the thing sought cannot be construed as violative of any law. As Chief Examiner Jones said at p. 169 of his opinion:

> "Application for license is compliance not defiance of freezing regulations."

Thus, the only three incidents, which involved petitioner subsequent to December 11, 1941, contribute nothing toward establishing that he was "an enemy agent" of the German Government after the declaration of war. The three incidents in fact confirm our contention that the

District Court's conclusion that petitioner was "an enemy agent" was based solely upon legal business transactions which took place prior to December 11, 1941. But that is not sufficient.

If the decision of the Court of Appeals is allowed to stand, the activities of American businessmen in the export and import business will be subject to unjust attack. This case, therefore, is of general public interest and importance. Further, if the Court below erred, the injustice to the petitioner is extreme, consisting as it does not only of confiscation of $1,300,000 of his property but his branding for life as a traitor to his country.

II.

The burden imposed by the District Court on petitioner to prove a negative and to show affirmatively that he was not an enemy agent under the Act violates due process, and the failure of the Court of Appeals to consider this matter calls for an exercise of this Court's power of supervision.

The District Court's reasoning as to petitioner's burden of proof began with the erroneous premise that petitioner's activities before December 11, 1941 made him a German agent. Because of that it placed the burden upon him to show affirmatively that he had discontinued those activities upon the outbreak of war. The Court then held that petitioner had not sustained that burden (A-41-42).

Highly significant is the fact that petitioner's position here is analogous to that of a defendant. He is challenging the Government's action by protesting against a seizure of his assets, which were summarily possessed by

the Alien Property Custodian, without the opportunity having been afforded him to protest that the seizure was unjustified under the Trading with the Enemy Act. *Societe Internationale* v. *Rogers*, 357 U. S. 197, 210-211 (1958).

It is notable in this connection also that the Alien Property Custodian made no finding in the vesting orders —as is the usual practice—that petitioner was "an enemy" under the Act. Chief Examiner Jones pointed this out and then stated—with utmost pertinence here—that this cast the burden of proving enemy status upon the Alien Property Custodian. Examiner Jones stated, at page 168 of his opinion:

> "Von Clemm was never determined by the Custodian in any vesting order to be an enemy; consequently the burden of establishing his enemy status, in view of his residence in the United States during the war, rests upon the Claims Section [of the Office of Alien Property]."

Nevertheless, the Court of Appeals did not even mention or discuss this serious issue respecting the burden of proof imposed upon petitioner even though that issue was strongly raised in our briefs and in our oral argument.

The presumption invoked by the District Court and ignored by the Court of Appeals did result—and also would result—in a discriminatory application of the Act to U. S. citizens. Any act must apply in the same manner and without discrimination to all citizens. *Duncan* v. *Missouri*, 152 U. S. 377, 382 (1894). Petitioner's acts prior to the declaration of war—since not illegal—cannot justify the adverse presumption invoked here against him, and form the substantive basis for a discriminatory application of the Act against him.

No other case under Section 9(a) of the Act has been found wherein a court held the claimant to be an enemy under the Act as a result of activities engaged in prior to the declaration of war. Further, no court has held that pre-war activities were presumed to have continued beyond the declaration of war, thus requiring claimant to bear the burden of showing by affirmative action that his pre-war activities were discontinued in order to avoid being branded an enemy agent.

Other courts have considered pre-war activity by way of background, but in those cases the courts have emphatically insisted that the Government show affirmatively that such background activity was engaged in after the declaration of war. They have further insisted that such post-war activity, standing by itself, must demonstrate that claimant was "an enemy" under the Act. *E.g. Sarthou v. Clark, supra,* p. 7, at p. 145.

We have found no case in which a claimant was held ineligible to seek recovery under the Act because he could not prove a negative, that is, furnish affirmative proof that he was not an enemy agent. When the claimant, as here, proves that he is a U. S. resident and citizen, and denies the allegation that he is an enemy agent, the burden of going forward with evidence to prove the contrary should be upon the Alien Property Custodian.

The District Court, affirmed by the Court of Appeals, violated the Fifth Amendment to the United States Constitution, we submit, by improperly imposing upon petitioner an impossible, an unreasonable and an unauthorized burden of proof—thus branding him a traitor and depriving him of his property without due process of law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari should be granted.

Respectfully submitted,

JOHN A. WILSON,
ROBERT L. CLARE, JR.,
B. G. ANDREWS,
Counsel for Petitioner.

SHEARMAN & STERLING,
20 Exchange Place,
New York 5, New York,
Of Counsel.

September 20, 1966.

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment V to the United States Constitution in pertinent part provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Section 9(a) of the Training with the Enemy Act, as amended (50 U.S.C. App. Section 9(a)), provides in pertinent part as follows:

> "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, * * * and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . ."

Section 2 of the Trading with the Enemy Act, as amended (50 U.S.C. App. Section 2), provides in part as follows:

> "The word 'enemy', as used herein, shall be deemed to mean, for the purpose of such trading and of this Act [sections 1-6 and 7-39 of this Appendix]—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> (b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.
>
> (c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy'. . . ."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 427—September Term, 1965.

(Argued June 3, 1966 Decided June 22, 1966.)

Docket No. 30288

WERNER C. VON CLEMM, *et al.*,
Plaintiffs-Appellants,

—v.—

ELIZABETH RUDEL SMITH, Treasurer of the United States, *et al.*,
Defendants-Appellees,

and

INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, *et al.*,
Intervenor Defendants-Appellees.

Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, *Judge*, —— F. Supp. ——, in favor of defendants, in an action brought by United States citizen pur-

suant to §9(a) of the Trading with the Enemy Act, 50 U. S. C. App. §9(a), seeking recovery of certain property vested by the Alien Property Custodian.

Affirmed.

JOHN A. WILSON, New York, New York (Robert L. Clare, Jr., B. G. Andrews, Thomas A. Dieterich, and Shearman & Sterling, New York, N. Y., on the brief), *for appellants.*

BRUNO A. RISTAU, Attorney, Department of Justice, Washington, D. C. (John W. Douglas, Asst. Attorney General and Morton Hollander, Dept. of Justice, Washington, D. C., Robert M. Morgenthau, U. S. Attorney, Southern District of New York, on the brief), *for appellees.*

AMOS J. PEASLEE, JR. and WALDEMAR J. DITTMAR, New York, New York (George Eric Rosden, and Butler, Koehler & Tausig, Washington, D. C., of counsel), *for intervenors.*

SMITH, *Circuit Judge*:

Werner C. von Clemm individually and as a partner of Rayford D. Alley, Trustee for von Clemm's children, in Bridge Import Company, appeals from a judgment dismissing the suit brought pursuant to §9(a) of the Trading with the Enemy Act, 50 U. S. C. App. §9(a), by himself and Alley against the Treasurer of the United States and against the Attorney General, to recover property vested by the Alien Property Custodian under §5 of the Act. The District Court for the Southern District of New York,

Edward C. McLean, *Judge,* held that von Clemm was an enemy under the Act, and therefore not entitled to recover. —— F. Supp. ——. The court did not reach the question of title. We find no error and affirm the judgment.

Von Clemm sought recovery of shares of stock in Pioneer Import Corporation of New York and of diamonds and synthetic and semi-precious stones or their proceeds. The jewels were seized prior to the outbreak of war with Germany (December 11, 1941) by Customs and by Postal authorities, and vested by the Alien Property Custodian in 1945.

Judge McLean's opinion contains a full statement of the facts. It is enough here merely to state the following. Von Clemm was a citizen of this country born in Germany. Around 1938 he conceived of a plan to import German goods into this country by paying for them one-half in dollars and one-half in German Marks which could be obtained at a substantial discount due to the fact that they were blocked. His plan was to have the owners of these blocked Marks purchase the German products in Germany, and send them to the United States through Pioneer, which he had organized, and through associates in Europe. Apparently this scheme was purely commercial. In any case none of the goods at issue here were paid for in any part with blocked Marks.

On May 10, 1940, the Low Countries were overrun by the German armed forces. On that date the Presidential freezing order of April 10, 1940, covering Denmark and Norway, Executive Order 8389, 12 U. S. C. §95a note, was extended to these newly occupied countries. Under the order, transactions in property with those countries, and, more directly, transactions in payment for such property, were severely regulated, so that exports from those occu-

pied countries to the United States could neither enter this country, nor could payment therefor leave this country, without license. This order was extended to most other European countries, including Germany and Switzerland, on June 14, 1941. See 12 U. S. C. §95a note. Until that date there was no impediment on importing German goods into this country from Germany or Switzerland, although importers had to avoid the British blockade.

Eleven days after the low countries were occupied, on April 21, 1940, von Clemm sent a memorandum to his brother, a German national, under an assumed name, in Bologna, Italy. The memorandum stated:

> The recent Rotterdam developments should make it interesting for us to enter the diamonds picture . . . . Please discuss with Cremer.

Cremer was an official of the German Economics Ministry (RWM), an expert on diamonds, with whom von Clemm had conferred in Europe in 1939. He was in Belgium as advisor to the German military government there as to the sale in the United States of Belgium diamonds for dollars. There is no direct evidence that von Clemm knew of Cremer's status in Belgium.

On October 25, 1940, Cremer submitted a memorandum to one Major Lemberg, the official of the German military government in charge of Belgium diamonds, which said:

> The isolation of Belgium from the entire other foreign world makes resumption of the diamond export possible only with the assistance of Germany as mediator [middle man?] . . . In accordance with personal conferences, the Imico-Handel, Berlin . . . . takes over the function of the necessary intermediate agency in Germany.

Imico was a German firm set up by Carl von Clemm, appellant's brother, and two associates, all of whom had previously worked for Eurohandel, a firm which had assisted in the blocked Marks transactions. The Cremer memorandum explains the role of Imico in diamond shipments: Belgian diamonds go by courier to Berlin, where Imico arranges the necessary papers, ships the diamonds to a neutral agent (a "cloak") in Portgual, who sends them along to New York; the New York buyer makes payment to a Berlin bank for account of Imico, which turns the money over to the German government. There was no direct evidence that von Clemm knew of this memorandum. Lemberg testified that Imico was the commercial agent of the Reich, but not that von Clemm knew this.

Between October 26, 1940 and early February, 1941, six packages of diamonds were sent by this route, according to plan. Evidence was introduced that a New York diamond purchaser received a letter from a former Belgian supplier offering diamonds, and accompanying the letter was a note instructing the buyer to make payment for credit of Imico at the Berlin bank, and to address communications to [an alias of] one of the Imico organizers in Lisbon. The Belgian supplier testified that he was directed to write the letter by Lemberg.

So far von Clemm's knowledge of the role of the German government as the real exporter and the party receiving payment is largely a matter of suspicion. But there is evidence that on June 27, 1940, Imico wrote Pioneer concerning diamond purchases, and said, "The Reich Economic Ministry want to do business with us and you . . . , your commission to be 2 percent," shipment via Lisbon. Based upon this and other evidence the District Court found that prior to the outbreak of war with Germany, von Clemm was a [knowing] agent of the German

government in the export of Belgian diamonds. This conclusion is unassailable, and we regard appellant's attack on this finding as frivolous.

One of the diamond shipments cleared customs in this country, and the diamonds were sold. This resulted in a conviction of von Clemm on conspiracy to import under a false declaration that the diamonds were of German origin, and to violate §95a and the freezing order as applied to Belgium. *United States* v. *Von Clemm,* 136 F. 2d 968 (2 Cir.), cert. denied 320 U. S. 76 (1943). The other shipments were seized by Customs and later vested by the Alien Property Custodian, and sold.

Von Clemm also engaged in the importation of German cut semi-precious and synthetic stones prior to the outbreak of war. Most such stones apparently are manufactured and/or cut in Germany, with the United States historically the principal market. This industry was highly regulated in Germany, but not, in a technical sense, nationalized. The German government regulated the export of the stones, in particular. Commencing in 1939, the government informed the stone cutters that export of the stones would have to be through Eurohandel. At the same time Eurohandel cabled Pioneer "RWM appoint you sole importer synthetics." When Imico was formed it was designated by the RWM as the replacement for Eurohandel as the exclusive exporter of the stones. Apparently Imico performed much the same services as with the diamonds. It paid the cutters, and received payment from von Clemm. Dollars were sent to neutral countries by von Clemm (first to the low countries, later Switzerland), and were drawn on by Carl von Clemm and others in Imico. The stones themselves were shipped by way of a Swiss "cloak" named Lambercier, who was made to appear the purchaser of the stones for his own account, and the exporter to the

United States as owner of the stones. 270 packages of stones were seized by Postal authorities in this country, turned over to Customs, and vested by the Alien Property Custodian.

The evidence in these transactions tending to show von Clemm was an agent of the German government as to them was, besides the similarity to the diamond transactions, the fact that some of von Clemm's payments went to the account of the German Navy in Switzerland, under a code name "Jalmac," which name appears in von Clemm's books of account. Von Clemm denied knowledge that the Navy was the recipient of the funds, but the District Court did not believe him, and found he was an agent of the German government as to these transactions. Such a finding may be disturbed if it is clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. However, the similarity to the diamond transaction and the existence of the name "Jalmac" are enough to make this finding not clearly erroneous. *Dickenson* v. *Burnham,* 197 F. 2d 973, 977-8 (2 Cir.), cert. denied 344 U. S. 875 (1952); *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 433 (2 Cir. 1945). It is implicit in the finding that von Clemm knew the German government was ending up with the funds and that Imico was its arm, and while this is largely an inference from undisputed facts (except as to von Clemm's denial, which, having been disbelieved, is worthless), a matter which has been held more freely reviewable, *Orvis* v. *Higgins,* 180 F. 2d 537 (2 Cir.), cert denied 340 U. S. 810 (1950), *Mottaghi* v. *Barkley Importing Co.,* 244 F. 2d 238, 248 (2 Cir.), cert. denied 354 U. S. 939 (1957), it is now settled that such inferences are themselves to be respected unless clearly erroneous. *Commissioner* v. *Duberstein,* 363 U. S. 278, 291 (1960); *United States* v. *United*

States Gypsum Co., 333 U. S. 364, 395 (1948). We can hardly reverse to substitute for one inference another which is no more probable.

But, as all the parties recognize, it is von Clemm's status after December 11, 1941, when hostilities commenced with Germany, that determines whether he is an enemy, and so barred here. Von Clemm had the burden of persuasion on the issue of his enemy status, as on every issue, *Societe Internationale Pour Participation, etc.* v. *Rogers*, 357 U. S. 197, 212 (1958). He attempted to meet this burden by a denial that he continued to operate as he had before. The District Court did not believe him. In addition, evidence was adduced as to conduct after the outbreak of the war, part of which tends to show he ceased his importing operations, and part the opposite, although none of the evidence is conclusive.

First, on December 18, 1941, one week after the outbreak of war, von Clemm cabled Lambercier asking that he "Send proof diamond one same as others" and noting that "License 213177 no funds while merchandise held pending investigation." The District Court interpreted the first phrase to mean that von Clemm, facing indictment on the first diamond shipment, desired proof of the German origin of the diamonds (which were in fact Belgian). While this is not altogether clearly the meaning, especially in view of the fact that Lambercier apparently played no role in the diamond transactions, as interpreted by the District Court it is of some slight relevance on the question whether von Clemm continued his activities after December 11.

The second event was that von Clemm received in March, 1942, a letter dated January 28, 1942, from Le Coultre & Cie of Geneva saying that it had consigned two boxes of stones to Bridge. This dealt with a shipment negotiated

before the outbreak of war. Von Clemm, on receiving the stones, turned them over to another dealer.

Finally, on April 21, 1942, von Clemm applied for a license to pay funds *into* a blocked account of Lambercier, but was unsuccessful. The money was in payment of a pre-war shipment then held by Customs.

Additionally, there was evidence that von Clemm's attorney advised him to cease dealing with Lambercier after Lambercier in January, 1942 was placed on the Proclaimed List of Blocked Nationals, and to dissolve the Bridge partnership, of which Lambercier was by then a partner. To this von Clemm replied that he would wind up Bridge, and notify the Treasury. There was no evidence that he did either.

Von Clemm argues that these events are insufficient to show that he was an agent of the German government after the outbreak of war. But since he had the burden of proving he was not an enemy agent, the only relevance of these events is insofar as they meet his burden. Von Clemm argues that the presumption that an agency continues is inapplicable in the case where war intervenes, *Insurance Co.* v. *Davis,* 95 U. S. 425 (1887), and the government counters with *William* v. *Paine,* 169 U. S. 55 (1898), and *Sutherland* v. *Mayer,* 271 U. S. 272, 288 (1926). But these cases deal with whether an agent's authority is terminated by war, a question we regard as irrelevant. Certainly if von Clemm ever had any authority to bind the German government, the intervention of war did not alter the intent of the parties to that agency. And the word "agent" in §2 does not really mean an agent in the sense of one with authority to bind, rather, it means merely one who carries out instructions, an operative, as in the colloquial "secret agent." Since one could be

found to be an enemy agent having no authority to bind the enemy government, cases dealing with the termination of commercial agency are inapposite.

All von Clemm has to meet his burden is his denial, which was not believed, his correspondence with his attorney concerning the dissolution of the Bridge partnership, and the rather equivocal "refusal" of the Le Coultre shipment. It was not error for the District Court to conclude that he had not met his burden of proving non-enemy status.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 571

WERNER C. VON CLEMM, ET AL., PETITIONERS

v.

ELIZABETH RUDEL SMITH, TREASURER OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner von Clemm brought suit under Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a), against the Treasurer and the Attorney General of the United States to recover the proceeds of property vested in the Alien Property Custodian. Judge Edward C. McLean, of the District Court for the Southern District of New York, found, after a six-week trial, that petitioner was an "enemy" under Section 9(a) of the Act by reason of having been an agent of the German government at the time hostilities commenced between the United States and Germany, and accordingly he dismissed the action. 255 F. Supp. 353 (App. A–3 to A–51).[1] The court of ap-

[1] "App." refers to the record appendix to petitioner's brief in the court of appeals.

peals, agreeing with the district court's findings, unanimously affirmed. 363 F. 2d 19 (Pet. App. 1b–10b).

Petitioner contends that this Court should review the decision below because the burden of proof imposed on him violates the Fifth Amendment (Pet. 14–16), and because an important question is presented concerning the definition of an "agent" of the "enemy" within the meaning of the Trading with the Enemy Act (Pet. 7–9). We submit, however, that the law as to the burden of proof is not only reasonable but well settled, and that petitioner failed to satisfy the burden imposed. In addition, on the concurrent findings of the courts below as to petitioner's activities, we think it clear that no important question of statutory interpretation is presented in this case.

Section 9(a) of the Trading with the Enemy Act permits "any person not an enemy,"[2] who claims an interest in property seized and sold under the Act, to institute suit for the recovery of the proceeds of the sale. Under familiar principles, the claimant has the burden of establishing all elements of his cause of action, including his non-enemy status. See, *e.g.*, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 212; *Sarthou* v. *Clark*, 78 F. Supp. 139, 141–142 (S.D. Cal.); *Manufacturers Trust Co.* v. *Rogers*, 181 F. Supp. 116, 121 (S.D.N.Y.), affirmed, 291 F. 2d 460 (C.A. 2); *Bosch* v. *Rogers*, 169 F. Supp. 877, 879 (D.D.C.). The Act

[2] "Enemy" is defined in Section 2 of the Act, 50 U.S.C. App. 2, as, *inter alia*—"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

extends to citizens and non-citizens alike. See, *e.g.*, *Stoehr* v. *Wallace*, 255 U.S. 239; *Manufacturers Trust Co.* v. *Rogers, supra*, 181 F. Supp. 116, 122 & n. 6; *Duisberg* v. *United States*, 89 F. Supp. 1019, 1022 (Ct. Cl.), certiorari denied, 340 U.S. 890. This Court has expressly upheld the fairness of the procedures of the Act against a challenge that it violated a citizen's Fifth Amendment rights. *Stoehr* v. *Wallace, supra.* Thus, petitioner's contention that—

> When the claimant * * * proves that he is a U.S. resident and citizen, and denies the allegation that he is an enemy agent,[3] the burden of going forward with evidence to prove the contrary should be upon the Alien Property Custodian" [Pet. 16]

—finds no support in the statute, is contrary to settled case law, and is certainly not compelled by the Constitution.

Petitioner asserts that the courts below found he was an agent of Germany "as a result of activities engaged in prior to the declaration of war" (Pet. 16), and then indulged in a "presumption" (Pet. 10, 15–16) that petitioner continued his activities after the outbreak of the war. We think it clear that the courts below, as in comparable cases,[4] considered the pre-

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[3] The quotation implies that the allegation of enemy status is made by the government. In fact, however, the claimant under the Act alleges in his complaint his non-enemy status. See, *e.g.*, *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482.

[4] See, *e.g.*, *Sarthou* v. *Clark, supra; Bosch* v. *Rogers, supra; Manufacturers Trust Co.* v. *Rogers, supra.*

war activity as highly relevant background[5] against which to judge petitioner's activity after December 11, 1941; they invoked no presumption, but rather drew from that background, viewed in relation to activity occurring within the later period, legitimate inferences which naturally arise from a long-continued course of conduct.

The evidence adduced at trial showed that late in 1940 and early in 1941 petitioner—in violation of prohibitions contained in wartime "freezing" regulations (see Executive Order 8389, 12 U.S.C. 95a note)—imported into the United States on three occasions diamonds of Belgian origin.[6] The trial court found that, in selling or attempting to sell these diamonds in the United States, petitioner acted as an agent of the German government pursuant to a plan conceived and put into operation by the German occupation authorities in Belgium, and that he knew that the dollar

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[5] Judge McLean properly stated: "In judging the significance and effect of what he [petitioner] did after December 11, we cannot properly be asked to shut our eyes to everything that went before." 255 F. Supp. at 370 (App. A-40).

[6] Petitioner cleared the first diamond shipment through Customs and sold the diamonds in the United States. This transaction led to petitioner's trial and conviction for a conspiracy to violate Executive Order 8389. *United States* v. *von Clemm*, 136 F. 2d 968 (C.A. 2), certiorari denied, 320 U.S. 769.

The second and third diamond shipments were seized by Customs, and were later vested in and liquidated by the Alien Property Custodian. Petitioner's present suit seeks, in part, the return of these liquidation proceeds. In addition, petitioner seeks the return of the sales proceeds of several shipments of semi-precious and synthetic stones—discussed in the text, *infra*—which were consigned to petitioner from Germany in 1941, detained by Customs, and subsequently vested in and sold by the Alien Property Custodian.

proceeds would be channeled to the German government (App. A–20 to A–24). Petitioner challenged this finding on appeal, and the court of appeals found the lower court's factual conclusions "unassailable" (Pet. App. 6b) and rejected petitioner's attack on them as "frivolous" (*ibid.*).

Similarly, petitioner disputed on appeal the trial court's findings that in 1940 to 1941 he acted as the exclusive agent of the German Ministry of Economics for the import of semi-precious and synthetic stones (App. A–25 to A–32); that after June 14, 1941, when the freezing controls contained in Executive Order 8389 were made applicable to Germany, these imports were transshipped through Switzerland (App. A–28 to A–30), and brought into the United States under the false representation that petitioner's Swiss partner had previously paid for the stones in Switzerland (App. A–31); and that proceeds from these sales were transferred to a "cloaking account" maintained by the German Navy in Switzerland (*ibid.*). Petitioner denied knowledge that the German Navy was the beneficiary of the sales. The trial court, however, did not believe him, especially in light of the fact that the code name of the German Navy's fund—"Jalmac"—appeared in petitioner's books of account (Pet. App. 7b–8b).[7]

[7] Judge McLean's conclusions as to petitioner's pre-December 11 activity are highly illuminating. In addition to the findings summarized in the text above, the judge stated (App. A–37 to A–38):

> Von Clemm's dealings were more than the normal operations of an American citizen engaged in the import business solely for the purpose of private gain. It may be that

As to petitioner's activities after the outbreak of hostilities, the trial court concluded from the evidence that petitioner, "* * * as far as he was able in the brief period available to him, between the declaration of war on December 11, 1941 and his indictment on April 24, 1942, tried to carry on as well as he could with what he had previously been doing" (App. A–40).[8] Petitioner's claim that he had severed his connections with the German government after December 11 was supported only by his personal denials—testimony which the trial court found unworthy of belief in light of all the evidence (App. A–42 to A–43). The court

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von Clemm sought a personal profit out of his transactions. If he did, evidence indicates that he was unsuccessful. I believe that the profit motive was mingled in his mind with a desire to be of service to Germany. But whatever his motives, we must consider his acts. In the diamond transactions, he acted on behalf of the German Government in collaboration with his brother in Germany. This court so found in the criminal case with respect to the first diamond shipment. A similar finding is justified, and indeed compelled, by the evidence here as to the other diamond shipments. As to the semi-precious stones, von Clemm knew that were it not for the direction of the German Government, he would not be sole importer of this merchandise. He insisted on being sole importer. He gave advice to his "tanwo friends" (*i.e.*, the German Economics Ministry), on how to conduct "economic warfare." He knew that at least some of the dollars that he paid for the stones ultimately were deposited to the credit of the German Navy. [Footnote omitted.]

[8] The indictment referred to by Judge McLean was for petitioner's conspiracy to violate Executive Order 8389; see note 6, *supra*.

of appeals, after a detailed review of the evidence as to petitioner's post-December 11 conduct (Pet. App. 8b–9b) stated that "part of [the evidence] tends to show that he ceased his importing operations, and part the opposite, although none of the evidence is conclusive" (Pet. App. 8b). But the court correctly refused to substitute its own inferences for those drawn by the trier of the facts, *Commissioner* v. *Duberstein*, 363 U.S. 278, 291, and held that it "was not error for the District Court to conclude that [petitioner] had not met his burden of proving non-enemy status" (Pet. App. 10b).

Petitioner asks this Court to review these factual determinations.[9] There is no occasion, however, to depart from the precept that this Court will not ordi-

[9] Petitioner relies repeatedly (Pet. 3, 8–9, 13, 15) on language contained in a recommended decision prepared by a hearing examiner of the Office of Alien Property in 1955, in connection with the administrative claim for the return of the vested property filed by petitioner with that Office. That reliance is wholly misplaced. The recommended decision was never adopted by the Director of the Office of Alien Property or by the Attorney General. Much of the evidence introduced by the government at the present trial to contravene petitioner's assertion of his non-enemy status was newly discovered, and had not been available at the time of the administrative proceeding. Moreover, a suit under Section 9(a) of the Trading with the Enemy Act is a trial *de novo*. *International Mortgage & Investment Corp.* v. *Von Clemm*, 301 F. 2d 857, 859 (C.A. 2). We note that the hearing examiner's decision recommended denial of petitioner's claim on the merits for lack of beneficial ownership of the vested property, an issue the courts below did not reach.

narily review the concurrent findings of the lower courts. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[10]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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[10] It is apparent that no novel or important question is presented in this case as to the scope of the Trading With the Enemy Act (compare Pet. 7). The Act defines enemy to include an agent of an enemy government; see note 2, *supra*. Manifestly, the term includes one who, like petitioner, knowingly renders economic aid to a country with which the United States is at war, for the basic purpose of the Act was to keep assets and other resources from those countries. *Uebersee Finanz-Korp.* v. *McGrath*, 343 U.S. 205; *Clark* v. *Uebersee Finanz-Korp.*, 322 U.S. 480, 484–485.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 571

WERNER C. VON CLEMM, ET AL.,
Petitioners,
v.
ELIZABETH RUDEL SMITH, Treasurer of The United States, et al.,
Respondents,
v.
INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, ET AL.,
Intervenor-Respondents.

MOTION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WERNER C. VON CLEMM, *pro se*
214 East 17th Street
New York, N. Y. 10003

New York, N. Y.
December 27, 1966.

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INTERNATIONAL MORTGAGE & INVESTMENT CORPORATION, *et al.*,

Intervenor-Respondents.

MOTION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Werner C. Von Clemm, hereby respectfully requests this Honorable Court to rehear the Petition for Writ of Certiorari previously filed, which this Court denied on December 5, 1966, Justices Black, Douglas and Stewart being of the opinion that certiorari should be granted.

Statement

The petition for a writ of certiorari herein stems from a suit by petitioner commenced 20 years ago, first under Section 32 and then continued under Section 9(a) of the Trading with the Enemy Act, as amended, 50 U.S.C. App. (the Act), to recover the proceeds of certain property vested in the Alien Property Custodian, consisting principally of synthetic and semi-precious stones emanating from Idar-Oberstein, the renowned German stonecutting center, and including two shipments of diamonds, which latter are primarily responsible for the existing misunderstandings and the protracted litigation.

Reasons for Granting Petition for Rehearing

1. The pending trial of Ernst Cremer, petitioner's alleged co-conspirator under a 1942 indictment, arrested on October 26, 1966 while on a business trip in New York, will make possible the introduction of documents excluded by the lower court for lack of identification, and the introduction of new testimony.

On October 26, 1966, i.e., since the filing of the petition herein, there was apprehended in New York one Ernst Cremer who was named a co-conspirator with petitioner in a 1942 indictment under which petitioner was found guilty, fined and imprisoned for having made an allegedly wrong origin declaration. The indictment charged that diamonds received by petitioner's import firm, Pioneer Import Corp. (Pioneer), in New York in the 1940-1941 period, were not of German origin, as declared, but of

NOTE: Unless otherwise indicated, references herein are to the pages of petitioner's Appendix filed in the Court below and now on file in this Court.

Dutch or Belgian origin. Defendants allege that Cremer, the German Military Government in Belgium and petitioner were co-conspirators in marketing Belgian diamonds in U.S.A. The pending Cremer trial will prove that the diamonds were indeed of German origin. The trial will thus disprove the finding of the Honorable Edward C. McLean in the District Court that the diamonds were of Belgian origin (App. A-24).

Petitioner's counsel, on April 6, 1942, made a motion before the U. S. District Court for postponement of petitioner's trial until after cessation of hostilities so that documents and witnesses, unavailable while a state of war existed, might be introduced. The District Court, however, denied that motion.* The Cremer trial, placed on the court calendar for March 1967, will now do what petitioner's trial in the heat of war (1942) could not do. It will permit Cremer to identify the documents which were then not available or could not be introduced for lack of identification. Among them is the proof which was needed to acquit petitioner at the time. The Cremer trial will give the opportunity to introduce newly-discovered evidence which will conclusively prove that no Belgian or Dutch transactions took place, that the allegedly Dutch or Belgian diamonds were of German origin and that no Dutch or Belgian diamonds were shipped to or received by this petitioner or by his import firm, Pioneer. The pending Cremer trial will thus disprove the allegation that this petitioner was an agent of the German Occupation authorities in Belgium before America's entry into the war

* It is petitioner's contention that postponement of the wartime trial should have been granted. The law on the subject has been clearly laid down by the Supreme Court (*Watts* v. *Union Austriace*, 63 L. Ed. 100, 248 U. S. 9 and in re *Kaiser Wilhelm 2d*, 246 Fed. (C.C.A. 1017) 786.

on December 11, 1941, as Defendants have charged (p. 4 of their Memorandum in Opposition of November 1966).

Moreover, if Mr. Cremer is acquitted, it will, in retrospect, certainly have been a grave miscarriage of justice that petitioner, on the same set of facts, had been found guilty, fined and imprisoned for having made an allegedly wrong origin declaration*.

2. The revocation of testimony by T. U. Lemberg, the Government's principal witness in the diamond matter, became available only after conclusion of trial and the adverse decision.

On, or about, June 22, 1966, the day the Court of Appeals upheld the District Court's adverse decision in this case, the U. S. Department of Justice received a statement, dated June 15, 1966, supported by a Belgian document dated October 23, 1941, from Mr. Tidemann Ulrich Lemberg, a German certified public accountant and a Major of the Reserve in the Army, who had acted as an adviser to the German Military Government in Belgium in the 1940-1941 period in civil administration matters, and who was Cremer's superior. Major Lemberg's statement unequivocally revokes his previous testimony. Whereas he had testified that six packages of diamonds had left Antwerp for transshipment via Berlin to petitioner's firm, Pioneer, he now amends his testimony to the effect that the six packages never left Antwerp. This matter was made the subject of a motion to the

* From the standpoint of U. S. Customs revenue, it made no difference whether the stones were cut in Belgium or Germany as the rate of duty would be the same. If the stones were Belgian property, they were however subject to Executive Order 8389, the "freeze" order of May 10, 1940, 12 U.S.C., 95a note, which made it necessary to secure a license before paying for them.

lower court for a new trial which was denied by the Honorable Edward C. McLean on December 5, 1966 (New York Law Journal, December 6, 1966).

The Lemberg Confession of Error will give added meaning to the pending Cremer trial. It also supports the findings of the administrative court of the Department of Justice concerning this same property (Matter of 40 Consolidated Claims of Carrie M. K. Beir, et al., Dkt. No. 183, Office of Alien Property (1955))* in which the Chief Hearing Examiner of that Bureau, Mr. Harry LeRoy Jones, concluded (p. 167) that documents offered by petitioner

> "* * * establish beyond any doubt that all these diamonds were cut in Germany and that none came from either Belgium or Holland after those countries were overrun by the German army on May 10, 1940.
>
> The shipping documents also establish that the second and third shipments were not on consignment but were offered as purchased merchandise to Pioneer. Title therefore passed to Pioneer upon arrival of the goods at the post office."

It is noteworthy that the trial before the District Court in the summer of 1964 produced purely circumstantial evidence to indicate that dealings in diamonds owned by Belgian merchants took place between Imico,(**) Berlin,

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* These are related administrative proceedings which are still pending before the Office of Alien Property. The Chief Hearing Examiner's opinion was marked as Plaintiff's Exhibit B in the trial court. It is presently awaiting review by the Attorney General. *International Mortgage & Investment Corp.* v. *Von Clemm*, 301 F. 2d 857, 859 (2d Cir. 1962).

** "Imico" is the abbreviation for International Mortgage Handelsgesellschaft m.b.H, the Berlin exporting firm from which petitioner purchased his goods, and of which his twin brother, Carl, was one of the managing directors.

and Pioneer, New York, in the 1940-1941 period. No Belgian merchant has come forward in 25 years to lay claims to any such alleged shipments or testify in regard to them. Defendants have proven none of their hearsay allegations. Thus the District Court's verdict of November 24, 1965 in regard to the alleged Belgian shipments rested entirely on the testimony of the Government's witness, Major Lemberg, now revoked. As aforesaid, the Lemberg evidence will figure importantly in the pending Cremer trial, and thus give added weight to this petition for reconsideration.

The similarity and relationship of the pending Cremer trial to this case constitutes grounds for a rehearing within Rule 58 (2) (e.g. *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34 footnote 1; *Massey* v. *United States*, 291 U. S. 608). The evidence in the possession of the government and the constitutional question, subsequently argued, represent "other substantial grounds available to petitioner although not previously presented" (e.g. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50).

3. Evidence in the possession of the Government would have established petitioner's right to recovery, but it was not presented to the lower court.

The District Court stated (App. A-42):

> "Von Clemm did testify that he went out of business after December 11, 1941 and that he so notified Lambercier(*). He testified that Lambercier

* Georges Lambercier, 5 Rue Madame de Stael, Geneva, Switzerland, stone dealer, was petitioner's Swiss purchasing agent and shipper (App. A-59 to A-62, A-72, A-73). Commerce between Switzerland and U. S. A. continued throughout the war (U. S. Dept. of Commerce statistics).

> insisted on shipping more goods to Bridge, whereupon I not only wrote letters and said "we are in difficulties; do not ship any more goods", but we accompanied this endeavor to make him desist from shipments by a telegram in which we specified that no goods were to be shipped * * *.' No such letter or telegram was ever produced, nor was the failure to produce them satisfactorily explained. In view of their crucial importance, the failure to produce them militates very strongly against the credibility of von Clemm's oral testimony(*)."

The vital telegram, Claims Branch Exhibit No. 272, referred to by the District Court was indeed in the Government's possession. The Government, in fact, introduced it sometime in the 1949-1956 period before the Administrative Court. It was quoted by the Chief Hearing Examiner of the Office of Alien Property as Finding of Fact No. 387 in his Recommended Decision, dated April 9, 1959, *supra*.

The telegram, dated January 23, 1942, was addressed to Anton Baccala, Alpenstrasse 41, Bern-Wabern, Switzerland, owner of a lapidary shop whom Lambercier had recommended to petitioner as a supplier of synthetic stones of *Swiss* manufacture. It read:

> "AB3 REFER AB1 DONT SHIP ANY MERCHANDISE. SEND PROFORMA INVOICE COVERING SAME FOR LICENSE APPLICATION WITHOUT WHICH IMPORT PROHIBITED."

This exhibit which demonstrated petitioner's veto of shipments unless licenses were secured should have been

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* "It is true that von Clemm's files were seized by the government apparently long before this action was begun, and remained in its possession * * *. If these important documents existed, he should have found them. There is no reason whatever to suspect that the government suppressed them."

made available to the court so that judicial notice might be taken of it. The Government certainly knew of it, for it was the Government who had introduced it in the administrative proceedings which antedated the present trial. Petitioner failed to introduce it because he could not find it. The court, on the other hand, would not be guided by the Hearing Examiner's findings.

POINT I

The Constitutional Issue.

The lower court has ignored the Fifth Amendment, Article 3, and Article 1 of the U. S. Constitution.

This case involves claims under the Trading with the Enemy Act which were timely filed over twenty years ago by a resident citizen who immigrated to America over 44 years ago. This petitioner is a non-enemy by virtue of citizenship and residence, and has neither been charged with, nor convicted of a violation of the Act. The lower court has nevertheless disqualified him from asserting his claims under Section 9(a) of the Act by declaring him an "enemy-agent" within the meaning of Section 2(b) of the Act in that he failed to prove a "negative"(*). Petitioner maintains that he never was an "enemy-agent" and that the burden of proof placed on him in this respect is an unconstitutional burden.

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* The District Court states (App. A-39):

"The question must be decided upon the evidence in the present case, bearing in mind that the burden is on plaintiff to prove a negative, i.e., that he was not an enemy. The evidence as to the affirmative acts of Von Clemm after December 11, 1941 is not extensive."

The Fifth Amendment of the U. S. Constitution.

Petitioner invokes the protection of the Fifth Amendment of the United States Constitution which in a recent work(*) by the Dean of Harvard Law School was thus summarized (pp. 1, 2):

> "The Fifth Amendment * * * is the source of our constitutional rule that serious criminal charges must be made by indictment of a grand jury. It provides that no person shall be * * * deprived of * * * property without due process of law, and that private property shall not be taken for public use without just compensation. * * * No person * * * shall be compelled in any criminal case to be a witness against himself."

Dean Griswold then makes the following suggestion (p. 76):

> "Our approach to the Fifth Amendment need not be wholly in terms of defending and explaining it. We may also utilize it, in a sense, offensively, as a reminder of the necessity of maintaining constant vigilance for the protection of individual rights. As a symbol, the Fifth Amendment can be a guide to a number of things which we should be doing better, and which we as members of the bar might well be doing to improve."

This is a civil case based in its present phase on the Government's contention that a criminal act took place. The Government accuses petitioner of having been an "enemy agent", an infamous crime in wartime. But the

* *The 5th Amendment Today,* Three Speeches by Erwin N. Griswold, Dean and Langdell Professor of Law, Harvard Law School, Harvard University Press, Cambridge, 1955, Library of Congress Catalogue Card Number 55-6809.

Government would not formally charge petitioner with such a crime because it knows that it could not bring such accusation before a grand jury and hope to prevail (App. A-40).

The Government would thus deprive this petitioner of his property without due process of law, and it would take his property for public use (in lieu of reparations owed by the German government) without just compensation. The Government would do so by the artful dodge of placing the burden of proof in regard to the absence of the alleged criminal act on petitioner, a pre-sixteenth century method, antedating the maxim of English common law, "Nemo tenetur prodere se ipsum" (Dean Griswold's book, supra, p. 2). The lower court has upheld this process of turning the clock back by forcing petitioner in this civil case to "prove a negative", and by then finding that such proof was not furnished. The lower court thus believes to have avoided the restrictions of the Fifth Amendment. Whether it acted properly is the paramount question before this Court. A further quotation from Dean Griswold's book, supra, is here in order (pp. 6, 7):

> "* * * the privilege (against self-incrimination) was generally recognized in the colonies after it had become established as a part of the common law of England * * * it was included in the proposals made by Congress which became the Fifth Amendment in 1791, and it has been there unchanged ever since. * * * I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized * * * the privilege is closely linked historically with the abolition of torture * * *."

Article 3 of the U. S. Constitution.

Defendants (footnote, page 8, of their November 1966 Memorandum in Opposition) state:

> "Manifestly, the term (enemy agent) includes one who, like petitioner, knowingly renders economic aid to a country with which the United States is at war * * *"

The accusation, false as it is, infra, Point V, puts this case clearly within the wording of Article 3, Section 3, Clause 1, of the Constitution of the United States, which reads:

> "Treason against the United States shall consist * * * in adhering to their enemies, giving them aid and comfort * * *"

The Government cannot have it both ways. If petitioner was a traitor he should be treated as such. Criminal law, not civil law, must apply. The lower court should have so considered. In upholding defendants, it has acted in violation of Article 3 of the Constitution, supra, which in its lower portion reads:

> "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

There were no two witnesses to the alleged overt act, nor was there a confession in open court.

The lower court is moreover in violation of the provision of Article 3, Section 3, Clause 2 of the Constitution, which states:

> "The Congress shall have power to declare the punishment of treason * * *"

Article 1 of the U. S. Constitution.

Section 5 of the Trading with the Enemy Act, Appendix, was amended by Act of Congress of December 18, 1941 c. 593, Title III, Section 301, 55 Stat. 839, and such amendment became applicable to Sections 1-31 of that Appendix (the Act). *Draeger Shipping Co.* v. *Crowley,* D.C.N.Y. 1943, 49 F. Supp. 215; *Standard Oil Co. et al.,* v. *Clark,* 163 F. 2d 917 (2d Cir. 1947) *cert. denied* 333 U. S. 873 (1948), 925.

Prior to the amendment, petitioner's property could not have been vested. As a resident-citizen of the U. S. A. he was not an "enemy" within the old wording of Section 5(b). Hence the question whether he might be an enemy under Section 2 of the Act was, prior to December 18, 1941, academic.

That the Honorable Edward C. McLean based his opinion and decision on *past conduct* is apparent from his finding (App. A-38):

> "I conclude, therefore, that at least until December 11, 1941, Von Clemm was an agent of the German government within the meaning of the Act."

> "This brings us to the second and more difficult phase of the problem. Was Von Clemm an agent of the German Government after December 11, 1941? Unless he was, he was not an enemy as the Act defines that term."

The lower court in finding petitioner an enemy-agent prior to December 11, 1941, on the basis of alleged conduct which antedated the amendment of Section 5(b) of the Act is clearly in violation of the ex post facto provisions of Article 1, Section 9, Clause 3 of the U. S. Constitution.

Judge McLean moreover conceded (App. A-40):

> "• • • if the burden of proof were upon the government, it is by no means clear • • • that Von Clemm acted on behalf of the German Government after December 11, 1941."

The lower court has termed this case an "unusual case". Indeed, it is. In denying the right of this petitioner to come forward and claim his property under Section 9(a) of the Act, the lower court has engaged in reasoning both stilted and violative of the Constitution of the United States. (It took the court 18 months to write the decision.) In placing the burden of proof on petitioner that he was not an enemy agent, the lower court is in violation of the Fifth Amendment and Article 3 of the Constitution. In deciding the punishment (confiscation) it is in violation of Article 3 of the Constitution in that it has usurped congressional powers. In considering "past conduct" it is in violation of Article 1 of the Constitution in that the present Trading with the Enemy Act is ex post facto.

It is the purpose of this request for a rehearing to ask this learned court to review the lower court's decision in the light of the above. It is petitioner's position that a plaintiff in a civil case may not be defeated by a criminal charge in regard to which he has not been tried. It is petitioner's position that a charge of treason is subject to the dictum of Article 3 of the Constitution and that it cannot, considering that it is an infamous crime, be hurled in a civil case at a resident-citizen-claimant under the guise of the Trading with the Enemy Act without violating the Due Process requirements of the Fifth Amendment and Article 3 of the Constitution—all for the plain and obvious purpose of confiscating a resident-citizen's property in defiance of the United States Constitution and in utter disregard of internationally valid concepts of law.

POINT II

Summary of Background of this Case.

Petitioner's firms, Pioneer Import Corp. and Bridge Import Co., were vested by the Alien Property Custodian in November 1942. Petitioner filed his claims with the Alien Property Custodian in late 1943. The hearings on the consolidated claims under the Administrative Procedure commenced before the Department of Justice, Office of Alien Property, Hearing Examiners' Branch, in late 1949. Due to the fact that several corporate entities were involved and that the title claims were complex, the hearings went on intermittently for over 9 years. The hearings concluded early in 1959. The Chief Hearing Examiner, before whom the hearings took place, rendered his Recommended Decision, covering 171 legal-size pages, on April 9, 1959, supra. In it he stated on the question of petitioner's eligibility (p. 168):

> "Von Clemm's eligibility to a return * * * has been vigorously denied by the Chief of the Claims Section ever since the inception of these proceedings in 1950. He is attacked as an agent of Germany and therefore an enemy as defined in Section 2 of the Act * * *. Von Clemm was never determined by the Custodian in any vesting order to be an enemy; consequently the burden of establishing his enemy status, in view of his residence in the United States during the war, rests upon the Claims Section.
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> 'Agent' is a very loose word; it is popularly used in many senses, some with a meaning almost opposite its legal meaning, for example, as in saying that a person is a 'free agent'. The fact that Von Clemm for Pioneer was given the exclusive franchise for

importing Idar-Oberstein products under Germany's controlled economy does not make Von Clemm an agent of the German government. He was obviously never 'subject to the control' of the German government as a principal, a requirement of agency as defined in Section 1 of the Restatement of Agency. Von Clemm was working for Von Clemm and nobody else. Just how hard he was working for Von Clemm appears in the Groups I and II findings and opinions.

That Von Clemm's commercial transactions resulted in benefit to the German economy prior to December 11, 1941 does not make them other than legitimate commercial transactions."

Petitioner settled in America 44 years ago, became an importer in 1933 (like so many immigrants before him), married an American girl (of British parentage), raised a family and paid his taxes. Petitioner, now a widower, has a son and a daughter, both born and raised in the United States. His son was graduated from Phillips Exeter Academy with honors as class historian and subsequently cum laude from Harvard University. He earned his Doctor of Literature degree at Corpus Christi College in Oxford, England, after spending two years on a research project in Africa which he carried on under a Ford Foundation grant awarded to him. He is married to an American girl, has two children, and is now an officer of the First National City Bank, stationed in London, England. Petitioner's daughter was graduated with honors from Springside School, Chestnut Hill, Pa., continued her studies at Vassar College and in Florence, Italy. She is married and has two children. Her husband is at present Headmaster of the English-Speaking School in Bern,

Switzerland. These facts are mentioned merely to indicate the solid American background of petitioner's family.

In 1938 petitioner organized Pioneer Import Corp. to import sundry merchandise from Germany. Originally he imported such items as rayon staple fibre, hops, lily of the valley pips, sundry chemicals, and also some consumer items (App. A-13), among these synthetic and semi-precious stones. With the outbreak of the European war in the fall of 1939 petitioner reduced his import activity to synthetic and semi-precious stones which could be shipped by registered mail and were thus less apt to be affected by British blockade measures. As a result of inquiries from his American clientele, he added diamonds to his list of potential imports as such fitted in with his other ringstone business. His inquiries about diamonds antedated the invasion of the Lowlands by the German army. No shipments had however been made until this event occurred. It is here where the problems started which petitioner with confidence expects will be solved 25 years later by the pending Cremer trial.

POINT III

The German licensing system did not put petitioner under the "direction of the German government".

In the period under advisement (1938-1941) no shipments could leave Germany without German governmental licenses. The licensing system, in fact, dated back to 1930 when, as a result of the great depression, rigid foreign exchange controls, which were purely domestic, were enacted in Germany. The lower court has equated

such controls with "direction of the German government" over the American importer, for its states (App. A-38):

> "The evidence as a whole, only part of which I have recited here, makes it clear that these stone transactions were carried on at the direction of the German Government through the medium of Imico and Pioneer * * *"

The record is however bare of any proof to support the court's opinion that the import transactions of Pioneer "were carried on at the direction of the German Government".* Although the United States Justice Department, Overseas Branch, with head office in Munich, captured German government documents at will, it failed to introduce a single exhibit which would prove "direction of the German Government" of petitioner, or of Pioneer. The U. S. State Department was in favor of trade with German industry, controlled or not, for it wrote petitioner as late as April 10, 1940, over the signature of its chief legal adviser, Green H. Hackworth, subsequently United States

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* The District Court (App. A-37) pondered petitioner's motives for being in business. The Court suggests that petitioner had "a desire to be of service to Germany", rather than seeking "a personal profit out of his transactions". In explanation the Court points to Pioneer's 1939 and 1940 income tax returns which showed losses for these periods. While it would not be unusual for a business venture to be unprofitable in its first year, Pioneer tax returns for 1940 and 1941 were subsequently amended to show very substantial income and corresponding tax payments (Tr. p. 3408).

The real gain is, however, represented by the sums tied up by the government. It would seem odd to take a merchant's goods, deprive him of his profits and then propound that the lack of profit proves that he was not a businessman but a government agent. Only prejudice will deny that petitioner took advantage of a business opportunity. The moneys held in the U. S. Treasury prove the correctness of his judgment. He ran the British blockade for profit. He had everything to gain by meticulously abiding by the license requirements of his own government. This he did.

member of the International Court in the Hague, Netherlands (App. A-78, A-124, A-125):

> "* * * You may be assured that the Department is doing all that it can to assist American importers of German goods * * *" (Plaintiff's Exhibit 84).

POINT IV

Petitioner was not a German agent before or after December 11, 1941, and was never termed such in any of the vesting orders which issued in the 1942-1948 period.

Petitioner was an importer, not an "enemy agent", and he stopped paying his bills to Germany (or Switzerland) on June 14, 1941. Thus petitioner did not aid Germany, not yet an "enemy", under any stretch of imagination, subsequent to June 14, 1941. (See Point V, infra.)

The word "agent" appears in section 2(b) of the Act in conjunction with the words "the government of any nation with which the United States is at war", "any political or municipal subdivision thereof", "any officer, official * * * or agency thereof". Since the Act was conceived as a protective measure so that property under the control of the enemy or his allies could not be utilized for the benefit of the enemy, it follows that the word "agent" in Section 2(b) is the equivalent, and descriptive of, one who serves the enemy government in a paid capacity or who handles that government's funds as a fiscal agent. The word certainly does not connote an American citizen engaged in the import business for private gain, whether his exporters operated under government licenses or not*.

* Petitioner, an importer, engaged in purely commercial activities, was never asked nor required to register under the Foreign Agents

As was said in the main petition (p. 16) we have found no case in which a claimant was held ineligible to seek recovery under the Trading with the Enemy Act because he could not prove a "negative", that is, furnish affirmative proof that he was not an enemy agent. When the claimant, as here, proves that he is a U. S. resident and citizen, and denies the allegation that he is an enemy agent, the burden of going forward with evidence to prove the contrary should be upon the Government.

The District Court in its conclusion (App. A-35) states:

> "The act does not define the word 'agent'. The few judicial decisions in this field do not discuss the definition in any detail."

The District Court then cites *Sarthou* v. *Clark*, 78 Supp. 139 (S.D. Cal. 1948); *Hansen* v. *Brownell*, 234 F. 2d 60 (D.C. Cir. 1956); *Stadtmuller* v. *Miller*, 11 F. 2d 732, 733, 734 (2d Cir. 1926); *Rusche* v. *Brownell*, 136 F. Supp. 835 (D.C. 1955), aff'd, per cur. 244, F. 2d 782 (D.C. Cir. 1957).

The decisive aspect of these cases was the question of *domicile*. Claimants Stadtmuller and Rusche (not charged with agency) won or lost, depending on the court's interpretation of "domicile". The decisions, in those cases where agency existed, Sarthou and Hansen, clearly pinpointed the meaning of the word "agent" within the association of words and phrases in Section 2(b) of the Trading with the Enemy Act. Claimants Sarthou (Von Neindorff) and Hansen were paid servants in the employ

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Registration Act of 1938. This act, as it was in effect from August 7, 1939, 52 Stat. 1245, until April 29, 1942, 53 Stat. 249, specifically excluded from its definition of "agent of a foreign principal" any person "performing only private, non-political, financial, mercantile or other activities in the furtherance of the bona fide trade or commerce of the foreign principal".

of the German government, or of its propaganda agency, "Rundfunk". They worked, and were domiciled, within the Central-European war-theater. What disqualified them was the double factor of the wrong domicile and the wrong activity, the latter truly descriptive of the meaning of Section 2(b). Sections 2(a) and 2(c) of the Act are not directed at citizens of the United States, resident in U. S. A. While the President of the United States may, by proclamation, include within the term "enemy" any individual, he may not do so in the case of a citizen of the United States. Thus, in the absence of the element of "cloaking", the burden of proof of a resident-citizen-claimant in regard to Section 2 is satisfied through citizenship and domicile. Petitioner is both a citizen of the United States and a permanent resident of the U. S. A. for the last 44 years.

And, as the Chief Hearing Examiner of the Office of Alien Property pointed out in his Recommended Decision (p. 168), "Von Clemm was never determined by the Custodian in any vesting order to be an enemy". (See Point II, *supra.*)

Petitioner cannot be found to be an "agent" of the German government merely because (1) that government controlled and regulated German industry, and petitioner, through Imico, purchased goods from such industry; or (2) petitioner or his supplier obtained licenses from German governmental agencies to export goods. In finding petitioner a "German agent" prior to Pearl Harbor, the lower court applied a subjective viewpoint. In regard to agency subsequent to Pearl Harbor, the lower court admits it lacks proof (App. A-40).

POINT V

The purpose of the Trading with the Enemy Act was observed by petitioner.

The lower court, quoting from *Stadtmuller* v. *Miller*, 11 F. 2d 732, 733-734 (2d Cir. 1926) stated with utmost pertinence (App. A-36):

> "The purpose of the Act has been said to be 'to make it impossible to aid the enemy (Germany) by forbidding that money or property of any kind held in the United States should reach the hands of the enemy. The intention was to make it impossible for a dollar to inure to the advantage of Germany'."

Actually the statement is incomplete in that it omitted the words "except with license from the President". That it was proper to engage in licensed trading with the enemy becomes apparent from a reading of the Act and of its legislative history. In his report to the Senate, 65th Congress, 1st Session, Calendar No. 115, Report No. 113 (to accompany H.R. 4960), Mr. Ransdell, from the Committee on Commerce, spoke of the purposes of the Act at the time it was inaugurated in 1917, and stated (p. 1):

> "The purpose of this bill is to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on * * * The spirit of the act is to permit such business intercourse as may be beneficial to citizens of this country, under rules and regulations of the President, which will prevent our enemies and their allies from receiving any benefits therefrom until after the war closes, leaving to the

> courts and to future action of Congress the adjustment of rights and claims arising from such transactions * * *"

Mr. Ransdell then set forth (pp. 4-8) under what conditions business intercourse may take place. At page 4 he stated:

> "Any form of trade with the enemy which is made criminal by section 3 may be performed under license from the President granted either to the person engaged in the trade or to the enemy person himself. Full provisions for licenses to be issued by the President are found in section 5 * * *"

Similar performance under license was authorized by Sections 4, 5, 7 and 10 of the Act, and such licensed performance was never affected or rescinded by subsequent amendments of the Act. It is thus clear that application for licenses were at all times proper after December 11, 1941, and that trading with the enemy was legal, provided such applications were granted.

Defendants, in the concluding footnote of their Memorandum for the Respondents in Opposition of November 1966 (p. 8) state:

> "* * * The Act defines enemy to include an agent of an enemy government; see note 2, supra. Manifestly, the term includes one who, like petitioner, knowingly renders economic aid to a country with which the United States is at war, for the basic purpose of the Act was to keep assets and other resources from those countries. *Uebersee Finanz-Korp.* v. *McGrath,* 343 U. S. 205; *Clark* v. *Uebersee Finanz-Korp.,* 322 U. S. 480, 484-485."

Your petitioner fully agrees with defendants' definition of "the basic purpose of the Act". Petitioner, however,

disputes—and vehemently so—the contention that he was one who "knowingly renders economic aid to a country with which the United States is at war". Petitioner's books (for 18 months in the lower court's possession) and the evidence in the case (App. A-77 to A-80), incontestibly prove that payments in the discharge of commercial obligations, the only "economic aid" ever given Germany by petitioner, were not made subsequent to June 14, 1941, fully 6 months before the United States entered the war. Defendants' statement is thus clearly untrue and self-serving. Petitioner at all times understood, agreed with and observed the purposes of the Trading with the Enemy Act.

POINT VI

The lower court's decision threatens the established order of property rights.

As it now stands, the lower court's decision will endanger every American-born businessman who opens an import firm in a foreign port. His American connections, his representation of American firms, could conceivably be cited at will by the foreign government to confiscate his goods under its nationalization statutes. The charge would require no more than the assertion that the trader's background makes him an American agent within the meaning of *Von Clemm et al., v. Smith et al.*, should the present decision remain unrepealed and become the law of the greatest trading nation in the world.

The lower court's decision, if allowed to stand, thus endangers the structure of Western beliefs; but it also tramples on the two cardinal principles which protect the

United States resident, i.e., every man is presumed innocent until he is proven guilty, and private property shall not be taken for public use without just compensation.

Unless the broad constitutional question here involved is ruled on, it is foreseeable that this case will have the widest domestic and international repercussions. Domestically it puts in jeopardy respect for constitutional principles. Internationally it will tempt every potentate from Jakarta through Cairo to the developing countries of Africa and South America to establish legislation which will place a heavy burden on the trader. There is moreover reason to believe that European countries where American investment is most heavily concentrated will find considerable interest in this decision. There too are would-be leaders in the wings who would change the carefully-established order of things.

POINT VII

The lower court's decision is discriminatory if measured by historical standards of adjudication.

The decision of the lower court is discriminatory and punitive within the meaning of previous court decisions. In *Cummings* v. *The State of Missouri,* U. S. Reports, 71 Wall 4 (1866) the court said (p. 330, 331):

> "A question arose in New York, soon after the treaty of peace of 1783, upon a statute of that State, which involved a discussion of the nature and *character of these expurgatory oaths, when used as a means of inflicting punishment of past conduct.* The subject was regarded as so important * * * that it engaged the attention of eminent

lawyers and distinguished statesmen of the time, and among others, of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which with his characteristic fullness and ability, he examines the oath and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guarantees, secured by the Revolution, of the rights and liberties of the people." (Emphasis provided.)

"'If we examine it' (the measure requiring the oath) said this great lawyer, 'with an unprejudiced eye, we must acknowledge, not only that it was an evasion of the treaty but a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and instead of obliging the State to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty'."

The lower court's insistence that petitioner prove a "negative" is analogous to the demand for an expurgatory oath in the *Cummings* case, supra. The aim is the same. The device is used "as a means of inflicting punishment of past conduct". Petitioner denies that he ever was a German agent, but the lower court insists that he purge himself by proving that he stopped being one after Pearl Harbor! It admits that it lacks evidence to support such agency after Pearl Harbor but it demands the "expurgatory oath", nevertheless.

The harshness of the present court decision is also in complete contrast to established court philosophy. In *Stadtmuller* v. *Miller,* 11 F. 2d (2d Cir. 1926), cited by the lower court, Judge Rodgers, who wrote the *Stadmuller* opinion, spoke of interpretation of the law (Trading with

the Enemy Act) (p. 735). He said, with pointed reference to the problems posed in cases arising under the Act:

> "In *United States* v. *Kirby,* 7 Wall 482, 486, 19 L. Ed. 278, Mr. Justice Field, writing for the court, said: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter * * *'."
>
> "To hold that * * *, loyal to the United States throughout the war, was nevertheless an enemy, whose property might be taken from him, is such an unreasonable and oppressive construction, and so repugnant to common sense, common justice, and common honesty, that we shall not so decide, unless compelled to do so."

In *Seested* v. *Post Printing & Publishing Co.,* 31 S.W. (2d), 1045, although not arising under the Trading with the Enemy Act, the Supreme Court of Missouri found for plaintiff, a naturalized German-American citizen who had lived in U. S. A. for more than 40 years. The Supreme Court affirmed the lower court's awards of compensatory and punitive damages against the publishing company which had smeared *Seested* with the accusation of "pro-German" sympathies. In this case as in the *Seested* case the families were firmly established in America and of unquestioned loyalty. The court in the *Seested* case considered this important aspect and found (p. 1052):

> "The relations existing between a husband and father on one side and his wife and children on the

> other are such that it may reasonably be inferred that their conduct and activities, under the stress of war conditions, fairly reflected his state of mind with reference to such conditions. The evidence was therefore both relevant and competent as tending to establish plaintiff's loyalty during the war * * *."

A United States citizen, at all times resident in U. S. A. during the war period, cannot be deprived of his property on mere suspicion of enemy sympathies. In *Kotoshira Jinsha* v. *McGrath,* 90 F. Supp. 892, the court said:

> "We have not yet come to the point * * * nor will we ever while 'this court sits' * * * where the government can take away a person's property because it does not approve of what that person believes in or teaches by way of religion or philosophy of life."

These sentiments were also voiced by the United States Supreme Court. In *Guessfeldt* v. *McGrath* (342 U. S. 308), Mr. Justice Frankfurter, who wrote the majority opinion, observed (p. 319):

> "* * * considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited. Instead of a carefully matured enactment, the legislation (Trading with the Enemy Act) was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes * * *."

POINT VIII

The law as to the burden of proof is not "well settled", as defendants claim.

The lower court did not charge petitioner with being an enemy agent after December 11, 1941, but stated (App. A-43, A-44):

> "• • • Von Clemm had failed to prove that he was not an agent of Germany, within the meaning of the Act, after December 11, 1941, and hence that he may not maintain this action under Section 9(a)."

Thus the lower court demanded proof of a "negative", that he was no such agent. As was submitted in the petition before this learned court, this is an unconstitutional burden. Actually, petitioner's burden is met by the established and uncontested fact that not a penny of revenue reached the enemy from petitioner, or from his firms, after June 14, 1941.

The lower court relied on this Court's decision in placing the burden of proof on this petitioner and cited in this respect *Societe Internationale* v. *Rogers,* 357 U. S. 212, 213 (1958). Yet it is subject to doubt what this Court meant by "burden of proof" in regard to claimants under the Trading with the Enemy Act. In the *Societe* case, *supra,* this Court stated:

> "In seeking recovery of the General Aniline stock and other assets, petitioner recognizes that it carries the ultimate burden of proof of showing itself not to be an 'enemy' within the meaning of the

> Trading with the Enemy Act • • • (b)ut these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits" (p. 212).

If read in context the burden there placed on claimant *Societe* was one of title under Section 9(a) via Section 5(b) and not of eligibility under Section 2. *Societe* was a "national" under Section 5(b) of the Act, and allegedly an "enemy" under Section 2(a) of the Act, of which this Court said (p. 212):

> "The Government already has disputed its right to recovery by relying on information obtained through seized records of I. G. Farben, documents obtained through petitioner, and depositions taken of persons affiliated with petitioner."

Yet, *Societe* was not disqualified by the Supreme Court from being heard "on the merits" in order to establish its claims to beneficial title in "the General Aniline stock and other assets". Its status under Section 2 of the Act was not even an issue in this Court's deliberations although the Nazi tinge on the case was heavy. As the case was settled out of court, the question of what this Court meant by "burden of proof"—whether it referred to title or to eligibility—must remain open to conjecture.

In *Manufacturers Trust Company* v. *Kennedy*, 291 F. 2d 460 (2d Cir. 1961), the other case cited by the District Court in support of the "burden of proof" question, the court sitting on the case unambiguously expressed that the burden to be borne by plaintiffs went to the question of beneficial ownership and not to the question of enemy status as dealt with in Section 2 of the Act. The court said (p. 467):

> "The burden which appellants must here sustain consists of a showing that they were the beneficial owners of the fund sought. *Le Due & Co.* v. *Rogers,* 7 Cir. 259 F. 2d 905; *Feller* v. *McGrath,* D.C.W.D. Pa., 106 F. Supp. 147, affirmed sub. nom. (and other citations)."

(p. 468): As was stated in *Feller* v. *McGrath, supra,* 106 F. Supp., at page 149:

> "Section 9(a) of the Trading with the Enemy Act requires that a plaintiff 'establish' the interest, right, or title he claims. This means plaintiff has the burden of establishing that he is the beneficial owner of the property involved * * *. Beneficial ownership is the heart of the case; it is part of plaintiff's prima facie case."

Accepting the viewpoint of plaintiffs in the *Societe* case, *supra,* and referring to the December 18, 1941 amendment of Section 5(b) of the Act, this Court found (p. 925):

> "* * * the effect of the change in law is to enable the government to meet the real evil of the cloaking of enemy property interests by apparent holdings by nationals of friendly powers. Seizure is permitted against such nationals, who can then secure a return only upon showing that the property is genuinely their own."

This Court thus clarified the essential meaning of the expression "burden of proof" as applied in its decision and as applicable to claims arising under the Trading with the Enemy Act. The burden is one to show "that the property is genuinely their own". Such burden is one of title, and not of eligibility.

In their Memorandum in Opposition (p. 2) defendants state:

> "We submit * * * that the law as to the burden of proof is not only reasonable but well settled."

and in their footnote, p. 8:

> "It is apparent that no novel or important question is presented in this case as to the scope of the Trading with the Enemy Act."

These are self-serving declarations. The law as to the burden of proof is well settled only in the Fifth Amendment of the Constitution of the United States. Thus this case presents a novel and important question.

The Government has failed to cite a single case arising under the Trading with the Enemy Act in which the burden of proof was on the *resident-citizen claimant* other than in respect to the question of the true ownership of what he claims. Every case cited by defendants (p. 3 of their Memorandum in Opposition) shows this to be true. The criterion in these cases is domicile and beneficial ownership. The eligibility of these *resident-citizen claimants* to claim title was not questioned (*Duisberg* v. *United States,* 89 F. Supp. 1019; *Halbach* v. *Markham,* D.C.N.J. 1952, 106 F. Supp. 475, affirmed 207 F. 2d 503, certiorari denied 74 S. Ct. 628, 347 U. S. 933, 98 L. Ed. 1084, *Manufacturers Trust Co.* v. *Rogers,* 81 F. Supp. 467, 468, *Stoehr* v. *Wallace,* 255 U. S. 239.

The proof of non-enemy status under the Act is one of showing domicile in the United States throughout the war, and proof of beneficial ownership in respect to the property claimed. No case exists where a resident-citizen claimant was termed ineligible under Section 9(a) of the Act—unless he purged himself from a criminal charge for which he had neither been tried nor convicted. Acting as agent of the enemy in wartime is such a crime. It is here where the *Cummings* case, *supra,* is directly in point.

Defendants, again for self-serving purposes, state (p. 3 of their Memorandum in Opposition):

> "This Court has expressly upheld the fairness of the procedures of the Act against a challenge that it violated a citizen's Fifth Amendment rights. *Stoehr* v. *Wallace*, 255 U. S. 239."

But that case is incorrectly cited! There the issue was one of title, and *not a denial of the right to be heard on title*. The *Stoehr* case was cited by this Court in *Societe Internationale* v. *Rogers*, 357 U. S. (1958), in which this Court said (pp. 210-211):

> "* * * Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure. See *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 318; cf. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489."

This petitioner, an American citizen permanently domiciled in U.S.A. for 44 years, is a non-enemy claimant within the meaning of the Act, just as claimants Societe and Stoehr were. It is here where this Court, in its wisdom and fairness, must find that the lower courts have made a mistake. American justice and American fair play so require. One cannot have worked hard—very hard—for 44 years only to find that the fruits of one's labors are taken by an artful dodge, and without even giving thought to compensation as required by the Constitution.

> "Summary power to seize property * * * is rescued from constitutional invalidity * * * only by those provisions * * * which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure." (*Societe* case, *supra*, pp. 210, 211).

The resident-citizen is a non-enemy claimant even if he were a common criminal. Only a wilful violation of the Act** can bring on forfeiture, and only *upon conviction.* The Government was entitled to seize while the war was on (Section 5(b) of the Act, as amended); thereafter, the resident-citizen claimant must be given a judicial hearing as to the propriety of the seizure.

POINT IX

The Paris Convention of 1954 has made no provisions for relief of claimants in petitioner's category.

This petitioner, an American resident-citizen, has no other place to turn. The Paris Convention of 1954, more specifically known as the "Convention on the Settlement of Matters Arising Out of the War and the Occupation", laid down in the "Protocol on the Termination of the

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** *50 U. S. Code, App., Section 16, offenses; punishment; forfeitures of property.*

Whoever shall willfully violate any of the provisions of this Act * * * shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; and * * * any property, * * * concerned in such violation shall be forfeited to the United States. Oct. 6, 1917, c. 106, Section 16, 40 Stat. 425.

Occupation Regime in the Federal Republic of Germany", signed at Paris on October 23, 1954*, states:

> *"Chapter Six. Article 3:*
>
> 1. The Federal Republic shall in the future raise no objection against the measures which have been, or will be, carried out *with regard to German external assets* or other property seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany. (Emphasis provided.)
>
> *Article 5:*
>
> The Federal Republic shall insure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated."

The Convention thus recognized the principle of compensation for the victims of our confiscation of German external assets during World War II. It put the burden of such compensation on the Federal Republic of Germany. It did so in order to stay within the teachings of the Fifth Amendment of the U. S. Constitution, which teachings are also incorporated in the post-war constitution of the Federal Republic of Germany.

The protocol, however, does not cover a person such as petitioner, an American citizen, resident in U.S.A.; the German government has so ruled. The District Court's decision thus leaves petitioner in "no-man's land". As it

* "Return of Confiscated Property", Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 83rd Congress, Second Session on S. 3423, U. S. Govt. Printing Office, Washington, 1954 (No. 50478), pp. 128-130.

now stands, it not only denies him due process over here but gives him no access to the relief provisions, arranged by the Paris Convention abroad. His property, if taken, will pay German reparations, but the German government will owe him nothing. It has bound itself to make amends only in regard to *German* external assets.

Conclusion

As was submitted in concluding the main petition, the District Court, affirmed by the Court of Appeals, violated the Fifth Amendment to the United States Constitution by imposing upon petitioner an impossible, an unreasonable and an unauthorized burden of proof—thus branding him a traitor and depriving him of his property without due process of law. This statement did not go far enough. Beyond the question of due process lies the cardinal principle of the civilized world and of the Fifth Amendment of the United States Constitution, "nor shall private property be taken for public use, without just compensation". Without statutory forfeiture as prescribed in Section 16 of the Act this principle must remain inviolate. It covers the resident-citizen in our midst.

Petitioner has devoted 25 years of his life to regain his property which, but for the war and petitioner's German background, would never have been touched. Petitioner has expended his energies and fortune on this endeavor. All he asks for is that he be *heard* on his title claims under Section 9(a) of the Act.

The Fifth Amendment "is the source of our constitutional rule that serious criminal charges must be made by indictment of a grand jury" (Point I, *supra*). The lower court concedes (App. A-40) that it lacks the substance for

such indictment. Instead it places the burden to prove a "negative" on petitioner. This is an impossible burden. As was pointed out, Point IV, *supra,* even the President of the United States lacks the power to include an American citizen within the term "enemy" (Sec. 2(c) of the Act).

The District Court's verdict, and the libelous press campaign released in its wake, has stamped this petitioner with the stigma of a Benedict Arnold and has all but destroyed the name and fortunes of an immigrant citizen whose friendships in the country of his choice were broadly based, and whose loyalty to his adopted country has, in the more than 44 years of his American domicile, never been questioned. Thus this simple denial of a property claim has gone further than the lower court undoubtedly intended. With his standing in the community lost, petitioner finds it difficult to meet his own children.

If a claim to property, legitimately acquired, could be defeated only by rejecting the claim on the basis of a finding tantamount to a charge of treason, then the court, in fairness, should have offered an alternative. To deny both property claim, and the alternative, puts in question the adequacy of the legal system. The District Court's demand that petitioner prove a "negative", i.e., that he was not an "enemy", is an unconstitutional burden placed on petitioner in that it violates the Fifth Amendment, and, in the words of Alexander Hamilton, it "obliges the citizen to establish his own innocence to avoid the penalty". To charge petitioner with treason "unless on the testimony of two witnesses to the same overt act, or on confession in open court" is moreover a clear violation of Article 3 of the Constitution. Defendants, supported by the lower

court, would ignore both. The court moreover acted *ex post facto*. It would punish petitioner on the strength of the amended Section 5(b) of the Act which Congress did not enact until December 18, 1941 (see Point I, *supra*).

This learned Court has under circumstances analogous to this case acted affirmatively on a petition for a writ of certiorari. Although the suspicion that the claimants in the other case were acting as agents of Germany was deep-seated and strong, this court in *Societe Internationale* v. *Rogers, supra,* alluding to the principal issue in Alien Property cases, i.e., beneficial title, said (pp. 212-213):

> "* * * It may be that in a trial on the merits, petitioner's inability to produce specific information will prove a serious handicap in dispelling doubt the Government might be able to inject into the case * * *. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits. On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective."

In the *Societe* case, a non-resident foreign claimant stood accused of acting for German interests—but this Court ordered that he be heard on the merits. In the present case a resident-citizen claimant is denied this privilege. This, in spite of the fact that precedent—and every decided case in the law library—accords this privilege where a resident-citizen claimant is concerned (see Point VIII, *supra*).

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue.

Respectfully submitted,

WERNER C. VON CLEMM
Werner C. Von Clemm, *pro se.*

New York, N. Y.
December 27, 1966.